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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

DENNIS D. HERRING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

ANDREW LEVCHUK
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1001, which proscribes false statements "in any matter within the jurisdiction of" federal agencies, covers a false statement on an application for unemployment benefits from the Georgia Unemployment Compensation Fund, which has been created and administered under the supervision and authority of the United States Department of Labor.

2. Whether petitioner's false statement was "material" under Section 1001.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20-28) is reported at 916 F.2d 1543. The order of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1990. The petition for a writ of certiorari was filed on February 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional plea of guilty in the United States District Court for the Middle District of Alabama, petitioner was convicted on one count of making a false statement in a matter within the jurisdiction of a department or agency of the United States, namely, making a false statement on an application for unemployment benefits to a Georgia program approved and supervised by the United States Department of Labor, in violation of 18 U.S.C. 1001. The trial court imposed a suspended sentence of one year in prison and two years' probation. The court of appeals affirmed (Pet. App. 20-28).

1. Pursuant to the Federal Unemployment Tax Act, 26 U.S.C. 3301-3311, and certain provisions of the Social Security Act, 42 U.S.C. 501-504, 1101-1109, the United States Department of Labor supervises and provides administrative and financial assistance to state unemployment benefit programs approved by the Secretary of Labor. Georgia has established such a program and administers it through two funds. Unemployment benefits are paid out of the Georgia Unemployment Compensation Fund, Ga. Code Ann. §§ 34-8-100 to 34-8-102 (1988), which is maintained primarily through contributions from Georgia employers, Ga. Code Ann. §§ 34-8-120 to 34-8-122 (1988 & Supp. 1990). A separate fund, the Employment Security Administration Fund, defrays the administrative costs of the Georgia program. Ga. Code Ann. § 34-8-81 (1988). The federal government contributes to that fund to assist with the Georgia program's "proper and efficient administration," 42

U.S.C. 502(a). The federal contribution generally covers administrative costs, including such items as salary and office expenses. Pet. App. 25.

In order to ensure that the federal funds are expended only on programs that further the national interest in compensating the unemployed, the Social Security Act sets forth a detailed list of requirements with which the state plans must comply. See 42 U.S.C. 503(a). Among other things, Section 503(a) requires a merit-based employment system, exclusive use of public employment offices, and a fair hearing system for challenges to denials of benefits. Section 503(a)(1)-(3). All funds received for the state compensation fund must be paid over to the Secretary of the Treasury to be held in the federal unemployment trust fund established under Section 1104. Section 503(a)(4). Funds are then disbursed from that fund to the state compensation fund for the payment of unemployment compensation benefits. With minor exceptions not relevant here, money from the state compensation fund cannot be expended other than as compensation for unemployment. Section 503(a)(5). As the State expends funds to compensate the unemployed, the State requests funds from the Secretary of the Treasury; the Secretary is authorized to remit to the State such funds "as it may duly requisition." Section 1104(f).

To ensure that the state program complies with these requirements, Section 503(a)(6) requires the State to make "such reports * * * as the Secretary of Labor may from time to time

require, and compl[y] with such provisions as the Secretary of Labor may from time to time find necessary to assure the correctness and verification of such reports." Similarly, the plan must make "available upon request to any agency of the United States charged with * * * assistance through public employment, the name, address, ordinary occupation and employment status of each recipient of unemployment compensation." Section 503(a)(7). If the State "fail[s] to comply substantially with" any of the provisions discussed above, the Secretary of Labor can direct the Secretary of the Treasury to cease making payments to the State. Section 503(b)(2).

The statute establishing the Georgia program in turn grants a dominant role to the United States Department of Labor. One section of that statute, Ga. Code Ann. § 34-8-79 (1988), instructs the Georgia Commissioner of Labor to "cooperate, to the fullest extent consistent with this chapter, with the United States Secretary of Labor and the federal official responsible for the allocation of funds for the administration of this chapter." Section 34-8-79 further requires the Georgia Commissioner -- in terms mirroring the terms of 42 U.S.C. 503(a)(6) -- to

> make such reports in such form and containing such information as the secretary of labor * * * may from time to time require and * * * comply with such provisions as the secretary of labor * * * may from time to time find necessary to assure the correctness and verification of such reports; and [to] comply with the regulations prescribed by the secretary of labor * * * governing the expenditure of such sums as may be allotted and paid to this state under [this program].

In sum, as this Court has recognized, the coordination of state unemployment programs with the efforts of the Department of Labor, as mandated by the Social Security Act, in effect establishes a "unitary plan for unemployment relief" and "a cooperative endeavor" between the States and the federal government. Buckstaff Bath House Co. v. McKinley, 308 U.S. 358, 363 (1939).

2. In January 1987, petitioner applied to the Georgia Department of Labor for unemployment benefits. Petitioner falsely stated on the application form that he had been unemployed since October 1986, when in fact he began working for a construction firm two days before he filed his application. Petitioner repeated the same false statements on four additional requests for unemployment compensation, even though he was gainfully employed when he filed those applications as well. Because of these false representations, the Georgia Department of Labor paid petitioner a total of $870.00 in unemployment benefits, using funds from the Georgia Unemployment Compensation Fund, Pet. App. 20-21, which in turn had been disbursed by the Secretary of the Treasury from the federal unemployment trust fund.

3. Petitioner initially pleaded guilty, but before sentencing became aware of the Ninth Circuit's decision in United States v. Facchini, 874 F.2d 638 (1989) (en banc), which held

that 18 U.S.C. 1001 did not apply to a similar transaction.[1] The district court rejected petitioner's claim that Facchini barred his prosecution, but agreed to allow petitioner to change his plea to a conditional plea pursuant to Fed. R. Crim. P. 11(a)(2), which allowed petitioner to raise the Facchini issue on appeal. Pet. App. 21-22.

4. Relying upon Facchini, petitioner argued on appeal that his false statements did not concern a "matter within the jurisdiction of any department or agency of the United States," 18 U.S.C. 1001.[2] The court of appeals nevertheless affirmed, expressly rejecting what it termed "the Ninth Circuit's narrow and technical definition of section 1001 jurisdiction." Pet. App. 24. In light of the Department of Labor's authority over

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[1]The Ninth Circuit held in Facchini that false statements on applications seeking benefits from Oregon's unemployment insurance program did not fall within the jurisdiction of the United States Department of Labor, primarily because the Secretary of Labor was authorized to monitor only the administrative structure of the unemployment benefits program and because "not one cent of federal money goes to pay the unemployment benefits," 874 F.2d at 640. The Ninth Circuit also relied on its perception that, "[b]ecause the Secretary is not empowered to act on the fraudulent claims of applicants for state unemployment benefits, such claims do not fall within the jurisdictional reach of section 1001." Id. at 642.

[2]18 U.S.C. 1001 provides that:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Georgia's receipt of assistance and administrative funds for its program, the court of appeals concluded that the false statements on petitioner's benefits application concerned matters within the jurisdiction of the Secretary of Labor. Id. at 24-26.

The court of appeals took note of this Court's admonition that "jurisdiction" within the meaning of Section 1001 should not be narrowly or technically defined. Pet. App. 25-26 (citing United States v. Rodgers, 466 U.S. 475, 480 (1984)). The court observed that before a state benefit program receives federal assistance under 42 U.S.C. 502, the State must satisfy the Secretary of Labor that the program meets the guidelines set forth in Section 503(a). The Georgia program had been approved under the criteria set forth in Section 503(a), and had received funds from the United States Department of Labor for administrative costs, including salaries and office expenses. Pet. App. 25. In light of the role of the Department of Labor in the operation of the state program, the court of appeals concluded that false statements made to the Georgia unemployment benefit funds were statements made "in a matter within the jurisdiction of" the Secretary of Labor. Id. at 25-26.

The court of appeals likewise rejected petitioner's claim that his false statements were not material within the meaning of Section 1001. Pet. App. 27-28. The court found that a false statement is material under Section 1001 if it can affect or influence the exercise of a government function. Id. at 27. The court then observed that the Secretary of Labor could be

influenced by false statements to the Georgia Department of Labor given her "obligation to ensure that the substantial sums the federal government spends to provide an unemployment program are not depleted through false claims which might misdirect or corrupt the functioning of a governmental agency." Pet. App. 28.[3/]

ARGUMENT

Although we agree with petitioner that the court of appeals' opinion conflicts with the opinion of the Ninth Circuit sitting en banc in United States v. Facchini, 874 F.2d 638 (1989), we do not believe this case merits review by this Court. First, the issue raised by the petition has arisen very infrequently. In fact, this case and Facchini are the only two court of appeals decisions of which we are aware that address the issue of the applicability of Section 1001 to false statements made to a State that is operating an unemployment compensation fund pursuant to the Federal Unemployment Tax Act and the Social Security Act.

What is more, the issue is unlikely to arise in the future. We have been advised by the Criminal Division of the Department of Justice that the only Section 1001 investigations known to it for false statements on unemployment compensation applications were initiated by the Inspector General of the Department of

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[3/]The court of appeals also rejected petitioner's claim that he was entitled to notice of the Department of Labor's jurisdiction over the Georgia unemployment program. Pet. App. 28. Petitioner does not renew that claim in this Court.

Labor. The Department of Justice subsequently has determined that it is inappropriate for the Inspector General to investigate such crimes, and we do not anticipate that any new prosecutions will be initiated under Section 1001 for false statements on applications for unemployment compensation.

Finally, for the reasons we discuss in detail below, we believe that the decision in this case is correct and that the Ninth Circuit's decision is erroneous, resting on a misunderstanding of the scope of federal authority in the supervision and operation of state unemployment compensation programs. Petitioner therefore will suffer no injustice if this Court declines to review his conviction.

1. The issue in this case is whether petitioner's statement was made "in a matter within the jurisdiction of" a federal agency for purposes of Section 1001. Interpreting that phrase, this Court has explained that

> [t]he most natural, nontechnical reading of the statutory language is that it covers all matters confided to the authority of an agency or department. Thus, Webster's Third New International Dictionary 1227 (1976) broadly defines "jurisdiction" as, among other things, "the limits or territory within which any particular power may be exercised: sphere of authority."

United States v. Rodgers, 466 U.S. 475, 479 (1984) (citation omitted). The Court acknowledged the existence of "narrower, more technical meanings of the term 'jurisdiction,'" but rejected them, explaining that "a narrow, technical definition * * * clashes strongly with the sweeping, every-day language on either

side of the term." Id. at 480; see Bryson v. United States, 396 U.S. 64, 70 (1969) ("the term 'jurisdiction' should not be given a narrow or technical meaning for purposes of § 1001"); United States v. Bramblett, 348 U.S. 503, 509-510 (1955) (explaining, in a case under Section 1001, that "criminal statutes are to be construed strictly," but "this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature").

In its first case interpreting Section 1001, this Court established that a matter could fall within the jurisdiction of a federal agency even if the false statement did not cause any loss of federal funds. United States v. Gilliland, 312 U.S. 86, 91-95 (1941) (false statements to a federal board set up to prevent transportation in interstate commerce of petroleum produced in violation of state laws). Similarly, it is well established in a variety of contexts that Section 1001 is not limited to statements that are made to federal agencies, but covers statements made to state agencies or private parties, as long as the statements directly affect the functions of a federal agency.[4/] Moreover, several decisions have found liability under

[4/]See, e.g., United States v. Gibson, 881 F.2d 318, 322-323 (6th Cir. 1989) (false statements on invoices submitted to contractor that was doing work for TVA); United States v. Lawson, 809 F.2d 1514, 1518 (11th Cir. 1987) (false statements on invoices to local housing authority with respect to project partially funded by HUD); United States v. Notarantonio, 758 F.2d 777, 787-788 (1st Cir. 1985) (false statements in draw requests submitted to lender on loan guaranteed by SBA); United States v. Brack, 747 F.2d 1142, (continued...)

Section 1001 in situations, like this one, where the statements were neither made directly to a federal agency nor likely to cause a monetary loss to the federal government.[5/] Indeed, the Court in Gilliland suggested that it was just such a case that provided the impetus for the enactment of Section 1001.[6/]

[4/](...continued)
1151 (7th Cir. 1984) (false statements to sureties of loan guaranteed by SBA), cert. denied, 469 U.S. 1216 (1985); United States v. Richmond, 700 F.2d 1183, 1187-1188 (8th Cir. 1983) (false statements on invoices to county for work in connection with federally funded flood relief); United States v. Wolf, 645 F.2d 23, 25 (10th Cir. 1981) (false statements on federally required certification to purchaser of petroleum); United States v. Stanford, 589 F.2d 285, 296-297 (7th Cir. 1978) (false statements to state agency on applications for food stamps and AFDC benefits), cert. denied, 440 U.S. 983 (1979); United States v. Lewis, 587 F.2d 854, 856-857 (6th Cir. 1978) (false statements to state agency on applications for AFDC benefits).

[5/]See United States v. Green, 745 F.2d 1205, 1208-1209 (9th Cir.) (false statements to purchaser of materials regarding their compliance with federal regulations for construction of nuclear power plants), cert. denied, 474 U.S. 925 (1985); United States v. Petullo, 709 F.2d 1178, 1180-1181 (7th Cir. 1983) (affirming conviction for false statements to city entity administering federal flood relief program without requiring proof that federal funds were expended); Richmond, supra (false statements on invoices to county for work not reimbursed by federal government, in connection with federally funded flood disaster relief); Wolf, supra (false statements on federally required certification to purchaser of petroleum); United States v. Cartwright, 632 F.2d 1290, 1292-1293 (5th Cir. 1980) (false records of subsidiary of federally insured savings and loan institution); United States v. Kirby, 587 F.2d 876, 881 (7th Cir. 1978) (false statement to private parties licensed as grain inspectors by federal Department of Agriculture).

[6/]312 U.S. at 93-95 (suggesting that a purpose of Section 1001 was to provide a basis for prosecuting the presentation to private parties of false papers in connection with the shipment of "hot oil" produced in violation of state production limitations). For a good background discussion of the "hot oil" problem in another context, see United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 171-174 (1940).

The nature of the program at issue here makes it clear that petitioner's false statements were made "in a matter within the jurisdiction of" a federal agency. First, the Georgia program was set up at the instance of the federal government and conforms precisely to a detailed blueprint established by the federal government and overseen by the Secretary of Labor. For that reason, the entire Georgia program is within the "sphere of authority" of the Secretary of Labor, to use the terms of the Rodgers Court, 466 U.S. at 479. Although the federal government does not provide the benefits, neither does the State; the federal government has designed a program that is relatively cost-free to the State, with the federal government funding the administrative costs and designing a tax system to place the cost of the benefits on private parties. That relationship between the federal and state governments brings petitioner's false statements within the reach of Section 1001. United States v. Gibson, 881 F.2d 318, 322 (6th Cir. 1989) ("Courts have routinely upheld § 1001 convictions for false statements made to state or local government agencies receiving federal support or subject to federal regulation."); United States v. Petullo, 709 F.2d 1178, 1180 (7th Cir. 1983) ("A false statement may fall within section 1001 even when it is not submitted to a federal agency directly and the federal agency's role is limited to financial support of a program it does not itself directly administer.").

It also is instructive to focus on the effects of false statements of the type petitioner made. First, they lead the

Secretary of the Treasury to disburse funds to the Georgia plan administrators to cover their disbursements, even though those funds ultimately are being disbursed to an individual who is not unemployed -- a disbursement that violates 42 U.S.C. 503(a)(5) and is a "perversion of the authorized functions," United States v. Stanford, 589 F.2d 285, 297 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979), of a program designed to mitigate the effects of unemployment. Second, in light of the reporting requirements of 42 U.S.C. 503(a)(6) -- which require the State to provide reports complying with such provisions as the Secretary finds necessary to "assure the correctness" of the reports -- false statements like petitioner's will cause the state plan administrators to violate the federal statute by conveying false information to the Secretary of Labor. Cf. Bryson, 396 U.S. at 71 ("A statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under § 1001."). In light of the statutory authorization to the Secretary of the Treasury to disburse to the States only funds that are "duly requisitioned," Section 1104(f), and the authority of the Secretary of Labor to stop further payments if the State fails substantially to comply with the provisions of Section 503(a), see Section 503(b)(2), the Department of Labor "has the power to exercise authority in [this] situation," Rodgers, 466 U.S. at 479. The court of appeals thus was correct in concluding

that petitioner's statements were made in a matter within the jurisdiction of a federal agency.[1/]

In reaching the opposite result, the Ninth Circuit in Facchini rested its analysis on an erroneous interpretation of the role of the Department of Labor in a state unemployment compensation program. The Facchini court concluded that the Secretary of Labor is "authorized to monitor only the administrative structure of the state program to determine whether it complies with federal requirements," and thus that "the Secretary does not have the authority to withhold certification of federal administrative funds even if a state pays fraudulent claims." 874 F.2d at 641-642. That conclusion, in turn, reflected the Ninth Circuit's reading of 20 C.F.R. 601.5(a) as preventing the Secretary from taking action when the State improperly grants benefits. Ibid. That interpretation of the regulatory scheme is in error. The pertinent statute, 42 U.S.C. 503(a)(5), makes it clear that funds from these programs can be paid out only for unemployment compensation; funds paid to a person who is not unemployed do not constitute unemployment compensation within the meaning of Section 503(a)(5). Section 503(b)(2) authorizes the Secretary to decertify a State's program

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[1/]Petitioner also suggests that Congress could not have intended Section 1001 to cover fraudulent receipt of state unemployment benefits, because 18 U.S.C. 1919 specifically covers receipt of federal unemployment benefits. Pet. 11-12. Section 1001, however, covers numerous statements also proscribed under more specific false statement statutes. See, e.g., United States v. York, 888 F.2d 1050, 1057-1059 (5th Cir. 1989) (approving conviction under Section 1001 and 18 U.S.C. 1014 for false statements to federally insured financial institutions).

if the program does not comply with Section 503(a); this power to decertify is restated in the very regulation on which the Ninth Circuit relied, see 20 C.F.R. 601.5(a)(4) (referring to and paraphrasing 42 U.S.C. 503(b)(2)). In that respect, contrary to the Ninth Circuit's characterization, the federal statutes set an eligibility requirement for compensation, which petitioner's false statements specifically were designed to circumvent.

2. Petitioner's second contention (Pet. 10-13) is that the court of appeals incorrectly determined that his false statements were "material." We disagree. As this Court recently explained,

> The federal courts have long displayed a quite uniform understanding of the "materiality" concept as embodied in [Section 1001 and similar statutes.] * * * The most common formulation of that understanding is that a concealment or misrepresentation is material if it "has a natural tendency to influence, or was capable of influencing, the decision."

Kungys v. United States, 485 U.S. 759, 770 (1988) (quoting Weinstock v. United States, 231 F.2d 699, 701 (D.C. Cir. 1956)). Thus, it is well settled that the "alleged concealment or misrepresentation need not have influenced the actions of the Government agency, and the Government agents need not have been actually deceived." United States v. Corsino, 812 F.2d 26, 30 (1st Cir. 1987) (citing cases). Petitioner does not challenge the court of appeals' invocation of that standard, but simply contends that the standard was not satisfied in this case.

Once again, petitioner relies on the Ninth Circuit's decision in Facchini. Again, however, the Facchini court's

analysis rests on a misunderstanding of the statutory program. The Facchini court concluded that the false statements at issue there were not material by reasoning that (a) federal involvement was limited to reimbursement of administrative expenditures; and (b) payment of fraudulent claims cannot affect administrative expenditures. See 874 F.2d at 644. The flaw in that reasoning is the premise that federal involvement is limited to reimbursement of administrative expenditures; as we have discussed, federal involvement is much more comprehensive. Accordingly, it is clear that petitioner's statements had the capacity to affect the actions of federal agencies, by causing the Secretary of the Treasury to make disbursements to the State from the federal trust fund, and by denying the Secretary of Labor the accurate reports from the State that are necessary for the Secretary to oversee and certify the operation of the program. Simply put, it is incongruous for petitioner to argue that it was not "material" for him to misstate his employment status when that status was the core jurisdictional fact that made him eligible for benefits from a federally designed and supervised program.[8/]

[8/]Petitioner incorrectly suggests that application of Section 1001 to him would violate the Due Process Clause. See Pet. 11 (citing Facchini, 874 F.2d at 644 (opinion of Alarcon, J., concurring)). Section 1001 applies without regard to whether the maker of the statement knew of the federal involvement. See United States v. Yermian, 468 U.S. 63 (1984). As the Court noted in a related context, that interpretation does not pose a risk of unfairness to defendants, because the individual defendant

(continued...)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

ANDREW LEVCHUK
Attorney

APRIL 1991

[8/](...continued)
knows from the very outset that his planned course of conduct is wrongful. The situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected. In a case of this kind the offender takes his victim as he finds him. The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum.

United States v. Feola, 420 U.S. 671, 685 (1975).

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT ALL PARTIES REQUIRED TO BE SERVED HAVE BEEN SERVED COPIES OF THE BRIEF FOR THE UNITED STATES IN OPPOSITION BY MAIL ON April 17, 1991.

JEFFERY C. DUFFEY
SUSAN G. JAMES
600 S. MCDONOUGH STREET
MONTGOMERY, AL 36104

Kenneth W. Starr
KENNETH W. STARR
SOLICITOR GENERAL

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